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November 27, 1996

Mr. William Caton
Acting Secretary
Federal Communications Commission
1919 M Street, NW
Washington, DC 20554

CS Docket 96-60
Ex Parte Filing

Dear Mr. Caton:

Pursuant to 47 C.F.R. §1.1206, an original of the enclosed letter and one copy for inclusion in the public file are submitted as an ex parte communication.

Sincerely,

John Podesta

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The Honorable Reed E. Hundt
Chairman
Federal Communications Commission
1919 M Street, NW
Washington, D.C. 20554

Re: Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Leased Commercial Access, CS Docket No. 96-60.

Dear Chairman Hundt,

As the Commission considers how to set maximum rates for leased access programming on cable, CME, et al. thought it would be helpful to update the record to include information about the recent dispute in New York City between Rupert Murdoch's Fox News and Time-Warner Cable. The facts of that dispute and the decision of the United States District Court in Time Warner Cable of New York City v City of New York, 1996 W.L. 641032 (S.D.N.Y.) ("Time Warner Cable"), clearly indicate the urgent need for the Commission to set reasonable rates that will make leased access a genuine outlet for unaffiliated programmers.

I. Leased Access Is The Preferred Solution For Situations Like New York, and The FCC Should Make It Work.

In New York City, Murdoch seeks carriage of a 24-hour news channel on Time Warner's cable systems. Time Warner, which owns a competing 24-hour news channel, has refused carriage. Judge Cote's opinion clearly states that, through leased access, Congress "provided a remedy for this

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situation -- where a cable operator refuses to carry a programmer for whatever reason -- by ensuring that a rejected programmer may lease access on the cable system, without permission from the cable operator." Id. at *27.

The most important reason this remedy is not working is that leased access rates have never been set at a reasonable level. Thus, leased access has not become a viable avenue, not only for non-profit programmers, but even for industry giants like Murdoch.

Another reason that leased access has not worked in this particular situation is that the city offered Murdoch the alternative of carriage on PEG channels. The court found that this scheme violated "the entire scheme of the Cable Act [which] creates three distinct types of programming: that chosen by the cable operator, that leased by other programmers, and PEG use." (Id. at *29). The court issued an injunction, saying that "New York City cannot make an end-run around the congressional determination that leased access is the solution to this type of situation." Id. at *28.

We urge that the Commission not make a similar end-run around Congressional intent by setting leased access rates that are too high. Congress made it clear in 1984 and again in 1992 that, as Judge Cote notes, "potential misuse of 'bottleneck' market power" (id. at 43) by operators could keep unaffiliated programming sources off cable systems. Congress directed the Commission to prevent this abuse of bottleneck power. By setting reasonable rates, the Commission can fulfill the stated purpose of leased access, to "assure that the widest possible diversity of information sources are made available to the public." 47 U.S.C. §532(a).

II. Cable Operators Do Not Have A Pre-Existing Right To The Leased Access Channels, and Thus Any Loss Of Use Of Channels That May Result From Increased Leased Access Demand Is Legally Negligible.

The Time Warner Cable decision is also relevant to the question of whether cable operators will suffer economic harm from increased use of leased access. The existence of any such harm depends on the baseline from which harm is measured. The decision leads to the conclusion that the baseline economic condition from which harm to the operator is measured must exclude the value of programming currently placed on dormant leased access channels.

With both leased access and PEG, operators are allowed to place programming on leased access or PEG channels which are not being utilized. (See H.R.Rep. No. 98-549, at 47, and 47 U.S.C. §532.) With PEG at issue in Time Warner Cable, Time Warner

argued that this provision gave them "an underlying right to all [PEG] channels." Time Warner Cable, at *37. The court disagreed. It stated that

> [t]he best reading of the statutory framework is that the answer to who owned the channels first is neither party -- the rights to the channels were created simultaneously at the time the franchise agreements were signed. Id. at *38.

Thus, Time Warner had no pre-existing rights to the PEG channels. We believe this decision was absolutely correct. Judge Cote properly defended PEG channels against their usurpation for non-PEG purposes, even by the franchise authority.

By Judge Cote's reasoning, if the FCC sets leased access rates that are too high, it will in effect be allowing cable operators to continue their usurpation of leased access channels for non-leased access purposes. Conversely, reasonable rates similar to the formula proposed in the March 1996 FNPRM would not result in economic harm to the cable operator. Rather, such rates would simply stop the usurpation.

For just as with PEG, it is clear that the operator does not have pre-existing rights in leased access channels. The best answer here to the question of "who owned the channels first" (id. at *38) is that, since 1984 when statutorily defined leased access channels were created, a certain percentage of every cable system has been dedicated to this purpose and is beyond the full ownership of the operator.

Congress found in 1984 that this leased access set aside did not economically harm the operators to a great degree, since the operator can still "provide information in which it has a financial or proprietary interest on the vast majority of its channels." (H.R.Rept. No. 98-549, at 33).

If operators were not harmed by setting aside the leased access channels in 1984, and if they do not have a true ownership interest in these channels, then all the profits they have derived from underused leased access channels since 1984 have been a windfall to the operators. Adopting reasonable rates which allow demand for leased access to increase will not cause economic harm to operators. At most, it will decrease their post-1984 windfall profits.

III. Court Findings Indicate That The Economics of Leased Access Can Work

Several key findings and statements by the United States District Court go directly contrary to the oft-heard industry argument that the economics of leased access cannot work. While

the industry claims that programming businesses are only viable when money flows from the operator to the programmer, the opinion in this case suggests that this claim is wrong.

First, there are "reverse flow" programmers already operating. That is, not all programmers receive payments from operators; some reverse the flow and have the programmer pay the operator. Judge Cote described the standard programmer-operator financial arrangement, but then pointed out that "[n]ot all [programmers] operate this way: some do not sell advertising ... and some do not charge on a per subscriber, per month basis (such as the TV Food Network)." (Time Warner Cable at *4). There is no reason the numbers of "reverse flow" programmers cannot be expanded through leased access.

Second, a viable leased access alternative would change the entire bargaining relationship, and programmers would have direct incentives to use leased access.

In the New York situation, the Judge explicitly found that Fox News was planning to use its PEG access to the cable systems as a bargaining tool to gain access on system-programmed channels. Id. at *41. The strategy, as described by the court, was that "by playing on the [PEG] channels, Fox News will build viewer loyalty and, when it threatens to leave [PEG] due to the absence of advertiser revenue ... it will leave Time Warner with the choice of carrying Fox News on its commercial channels or angering viewers." Id. Thus "Fox hope[s] and expect[s] that access to the New York market ... will win for them the opportunity to run on commercial channels in the near future." Id. at *33.

While that strategy is a deplorable misuse of PEG, a for-profit entity could use leased access as a foothold to build name recognition and market share. It could thus demonstrate its economic value to the cable operator before seeking carriage on system-programmed channels. A business could look at leased access lease payments as a long-term investment with significant hope of payoff -- so long as the FCC sets reasonable rates. And allowing leased access programmers to demonstrate their economic viability to the cable operator does not raise the coercive First Amendment problems Judge Cote identified with New York's mis-use of PEG. See Time Warner v. FCC, 1996 WL 491803 (D.C. Cir.).

Similarly, a non-profit programmer could benefit from leased access carriage. We have argued in our Comments, Reply Comments, and in an Ex Parte letter that non-profit programmers should have a portion of leased access capacity set aside for them. As the non-profit programming proved to be a source of positive value to the system through the audience it brings in, the operator and the programmer might later negotiate a more traditional carriage package on system-programmed channels.

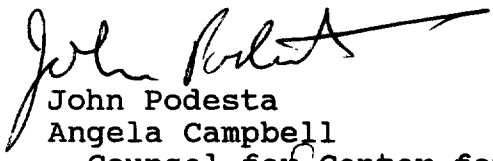
This strategy would accomplish exactly what Congress hoped to achieve through leased access. Programmers who do not initially find favor with the cable operator would be able to obtain carriage, and thus viewers would be served by a wider diversity of programming sources. The bottleneck that Congress so feared would be forced to open up a little bit more. The public would benefit.

Of course, this strategy can only work if the rates are significantly lower than the unreasonable rates operators have previously charged.

IV. Conclusion

For the foregoing reasons, we urge the Commission to set leased access rates, for both non-profit and for-profit programmers, that are reasonable and much lower than current rates.

Sincerely,



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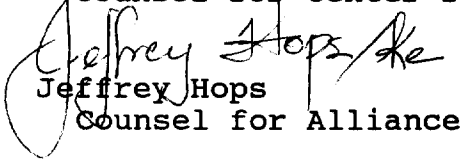

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